



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 20 2003

The Honorable Mitch McConnell
United States Senate
Washington, DC 20510-1702

THE ADMINISTRATOR

Dear Senator McConnell:

Thank you for your April 3, 2003, letter on behalf of Robert G. Clark, Chairman of the Kentucky Commission on Small Business Advocacy and a member of the Region 4 Regulatory Fairness Board. I appreciate your interest in the Environmental Protection Agency's (EPA's) Small Business Policy.

In your letter, you identify several issues of concern regarding the application of the Small Business Policy in regional and State activities, and request clarification of the Agency's position on these issues. I have enclosed a document detailing the Agency's role in working with States on the issues you raised. It is my hope that this document addresses each of your questions and provides you with the clarification you seek.

I want to assure you that EPA is committed to making its enforcement and compliance assurance programs more effective in protecting public health, safety and the environment. We welcome opportunities to improve and enhance EPA's ability to be responsive to small businesses and to assist them in complying with environmental requirements. EPA continues to work with our State partners through associations, such as the Environmental Council of States, to encourage States to adopt small businesses programs. We stand ready to work with the Commonwealth of Kentucky in the event it desires to adopt a small business program that is consistent with applicable Federal regulations for approved State programs.

Again, thank you for your letter. If you have questions or need additional information, please contact me or your staff may contact Mark Stevens in the Office of Congressional and Intergovernmental Relations at (202) 564- 3707.

Sincerely yours,



Christine Todd Whitman

Enclosure

EPA Response to Chairman Clark's Concerns About EPA's Small Business Policy

1. What impact would a state's passage of a law comparable to EPA's Small Business Policy have on EPA's ability to delegate federal enforcement authority to a state?

EPA's Small Business Compliance Policy is clear that EPA supports comparable state small business disclosure policies. The Policy states:

Small businesses may take advantage of small business policies that many States have developed. EPA recognizes that states and tribes are partners in enforcement and compliance assurance and may have adopted their own penalty mitigation policies in Federally-authorized, approved or delegated programs. Therefore, EPA will generally defer to State and Tribal penalty mitigation for self-disclosures as long as the State policy meets minimum requirements for Federal delegation and is generally consistent with the criteria set forth in this Policy. (65 Fed. Reg. 19630 (April 11, 2000).)

EPA has made a concerted outreach effort through mailings and meetings with state organizations to encourage state adoption of EPA's Small Business Compliance Policy, or an equivalent policy that provides incentives for small businesses to seek compliance assistance and to disclose and correct their violations. Because policies by definition allow for the exercise of discretion in their application, they are less likely to conflict with federal program approval requirements. Thus, a state policy that authorizes, but does not require, the mitigation of penalties for small businesses, would not conflict with the general federal program approval requirement that a state must have the legal authority to assess a penalty for any violation of the approved program.

As an alternative to adopting a policy, a state may choose to enact legislation that provides the same kinds of incentives as would a policy. If a state chooses to go that route, it must ensure that the legislation it enacts is consistent with federal program approval requirements; otherwise, new elements of programs that have already been approved cannot be authorized, and the overall state program will invite a citizen petition to withdraw the program.

EPA faced this exact situation several years ago when the Commonwealth of Kentucky enacted an audit immunity and privilege statute that was not consistent with federal program approval requirements. That conflict prevented EPA from authorizing or approving new elements of many of the programs that Kentucky administers, and delayed the approval of the Commonwealth's Clean Air Act Title V program. It took several years for Kentucky to enact corrective legislation. In the meantime, regulated facilities in Kentucky had to deal with Kentucky regulators on those parts of programs that had been previously authorized or approved,

and with EPA for those parts that could not be authorized or approved because of the conflict between state law and federal regulations. We believe it is in the interest of all parties that regulated entities in Kentucky, and especially small businesses, not be placed in the position of having to deal with both federal and state regulators due to enactment of well intended but substantively deficient legislation.

If the Commonwealth of Kentucky desires to enact legislation that embodies the types of incentives contained in the EPA Policy, we stand ready to provide specific guidance as to what must be in that legislation so as not to run afoul of federal program approval requirements. The contact in EPA Region 4 for such guidance is Bill Anderson, Deputy Regional Counsel, who may be reached at (404) 562-9680.

2. Does EPA's Small Business Policy apply in regional EPA enforcement activities?

The Small Business Policy is an agency-wide policy, applicable to all compliance and enforcement programs that EPA itself administers. If a small business invokes the policy and meets the criteria for penalty mitigation, EPA will provide the relief authorized by the policy. If Mr. Clark has information of specific instances in which the Agency has failed to apply the policy in Region 4, that information should be provided to the Regional Administrator of Region 4, Mr. Jimmy Palmer, who can be reached at (404) 562-8357.

3. Do the small business protections in the Small Business Regulatory Enforcement Fairness Act (SBREFA) transcend the state level when federal agencies, like EPA, delegate their enforcement authority to states?

There is no provision in SBREFA, nor in the environmental statutes that EPA administers, that imposes the requirements of SBREFA on the states. There also is no provision in the environmental statutes that EPA administers that gives EPA the authority to require states to provide SBREFA type protections as a condition of program approval or authorization. Thus, Congress would have to amend SBREFA or the environmental statutes if it wanted the provisions of SBREFA to apply to the states. However, as discussed above, nothing in SBREFA or the environmental statutes precludes a state from providing compliance incentives for small businesses so long as those incentives are consistent with federal program approval requirements.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

MAY 9 2003

The Honorable Mitch McConnell
United States Senate
Washington, DC 20510-1702

Dear Senator McConnell:

Thank you for your April 3, 2003, letter to EPA Administrator Christine Todd Whitman on behalf of Robert G. Clark, Chairman of the Kentucky Commission on Small Business Advocacy and a member of the Region IV Regulatory Fairness Board. The concerns you expressed regarding EPA's Small Business Policy and delegation of enforcement authority and applicability to regional enforcement activities require consultation and coordination of various components of the Agency's Office of Enforcement and Compliance Assurance and Regional offices. Accordingly, we will provide a response to your specific concerns by May 22, 2003.

In the meantime, if you have questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, which appears to read "J. I. Palmer, Jr.", is positioned above the typed name.

J. I. Palmer, Jr.
Regional Administrator

MITCH McCONNELL
Kentucky

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April 3, 2003

The Honorable Christine Todd Whitman
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Whitman:

I am writing you on behalf of one of my constituents, Robert G. Clark, Chairman of the Kentucky Commission on Small Business Advocacy, and a member of Region IV Regulatory Fairness Board. Mr. Clark has expressed concerns about comments allegedly made by EPA Region IV officials to Kentucky EPA Commissioner Robert Logan, and Kentucky Natural Resources and Environmental Protection Cabinet Secretary Hank List regarding applicability of EPA's Small Business Policy in Region IV and in Kentucky.

His first two issues of concern directly impact small businesses in Kentucky and in Region IV, while the third issue impacts many of the 25.5 million small businesses in the US.

1. EPA Region IV officials have told Kentucky Department for Environmental Protection Commissioner Robert Logan that if Kentucky passed a law comparable to EPA's Small Business Policy, EPA Region IV would question EPA's ability to delegate their enforcement authority to Kentucky.
2. EPA Region IV officials, and state officials in other EPA regions, have told Commissioner Logan they do not apply EPA's Small Business Policy in regional enforcement activities.
3. The small business protections in Small Business Regulatory Enforcement Fairness Act (SBREFA) do not transcend the state level when federal agencies, like EPA, delegate their enforcement authority to states.

Mr. Clark believes that while EPA has done a good job implementing SBREFA and creating a beneficial Small Business Policy that is "a model for other federal agencies," Kentucky small businesses are not seeing the benefit of these policies.

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Mr. Clark also said the EPA delegates almost all of its enforcement and compliance activities to the Kentucky Natural Resources & Environmental Protection Cabinet. EPA also delegates the same authority to other states in varying degrees and each state is different. In some states, EPA retains its enforcement and compliance authority in certain areas.

Given the Bush Administration's emphasis on reducing the regulatory burdens facing small businesses, including the President's Small Business Plan, the SBREFA, Executive Order 13272 - Proper Consideration of Small Entities in Agency Rulemaking - I would encourage EPA, when delegating their enforcement authority, to provide more specific guidance to the states in adopting the small business protections provided by SBREFA and the EPA Small Business Policy.

I would like confirmation, on Mr. Clark's behalf, that EPA's regional offices are applying EPA's Small Business Policy when dealing with all small businesses, including Kentucky, assuming required criteria are met.

Finally, I would appreciate clarification that the state of Kentucky will not be penalized if Kentucky adopts laws and regulations comparable to SBREFA or EPA's own Small Business Policy.

To contact Mr. Clark directly with specific questions, he can be reached at:

Clark Communications
P.O. Box 24766
Lexington, Kentucky 40524
(859) 233-7623

Thank you for taking the time to address these concerns, and I look forward to your response.

Sincerely,



MITCH McCONNELL
UNITED STATES SENATOR

MM/mhy